

EXHIBIT QQQ

In The Matter Of:

*KYLA HANNAH HERSEY-WILSON v.
NEW YORK CITY*

April 20, 2006

*CONFERENCE
SOUTHERN DISTRICT REPORTERS
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[1] 64kPherM
[2] UNITED STATES DISTRICT COURT
[3] SOUTHERN DISTRICT OF NEW YORK
[4] -----x
[5] KYLA HANNAH HERSHY-WILSON,
[6] Plaintiff,
[7] v. 05 cv. 7026 (KMK)
[8] NEW YORK CITY, et. al.,
[9] Defendants.
[10] -----x
[11] Before:
[12] HON. KENNETH M. KARAS,
[13] District Judge
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New York, N.Y.
April 20, 2006
11:30 a.m.

[1] claims of misconduct and other, arguably, privileged
[2] information. And I ended up agreeing with you that Judge
[3] Francis's rulings were not clearly erroneous or contrary to
[4] law. I was just struck by that.

[5] The city gets a five-point demerit for citing an
[6] unpublished Second Circuit decision

[7] **MR. MIRRO:** The Supreme Court ruled --
[8] **THE COURT:** -- the Judicial Conference said that as of
[9] 2007, it is okay to cite unpublished opinions. But just be
[10] careful because there are some people in the building who might
[11] get pretty hot under the collar.

[12] **MR. MIRRO:** We will, your Honor.

[13] **THE COURT:** Quick question for Mr. Dougherty. I will
[14] definitely hear from you, Mr. Meyerson.

[15] What is the standard of review where, what Judge
[16] Francis did was said that my ruling in MacNamara precluded him
[17] from, in effect, agreeing with Mr. Meyerson?

[18] So what we have is a situation, before the case gets
[19] referred to a Magistrate Judge for discovery purposes, I issue
[20] a discovery ruling in another case, albeit, one that's related,
[21] which is why I got a hundred of these things. And Judge
[22] Francis feels bound by that ruling in this case. And then Mr.
[23] Meyerson appeals that ruling.

[24] Is it Rule 72, abuse of discretion and contrary to
[25] law?

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[1] (In open court)
[2] MR. MEYERSON: Good morning, your Honor, James
[3] Meyerson for Ms. Hershey-Wilson.
[4] THE COURT: Good morning, Mr. Meyerson.
[5] MR. DOUGHERTY: Good morning, Jeff Dougherty for
[6] defendants.
[7] THE COURT: You got the call on this one, Mr.
[8] Dougherty.
[9] MR. MIRRO: And James Mirro.
[10] THE COURT: Good morning, your Honor. Again, for the
[11] record. This is becoming a habit. There are worse habits in
[12] life.
[13] I have to say, Mr. Meyerson, I was struck your
[14] reply --
[15] MR. MEYERSON: -- I don't know if that's good or bad.
[16] THE COURT: It's sort of interesting. There is this
[17] sort of righteous speech-like tone to you. You sort of have to
[18] live by the privilege and die by the privilege.
[19] And you are very critical of the city's invocation of
[20] certain privileges relating to their office -- psych testing
[21] records are sought by the plaintiff. And misconduct.
[22] Invariably the city's attorneys object to what I was saying
[23] before; that's true.
[24] You were here six, seven weeks ago when they wanted to
[25] invoke certain privileges having to do with unsubstantiated

[1] **MR. DOUGHERTY:** Your Honor, I would submit that in our
[2] papers to Judge Francis, while I can't determine what it is
[3] that, you know, ultimately determined his rationale, that we
[4] did submit case law as well as transcripts from your ruling in
[5] MacNamara. And I believe this is a Rule 72 motion to be
[6] governed by the earlier clearly erroneous standard or contrary
[7] to law standard, whether or not at this level a discovery
[8] motion can be overturned.

[9] **THE COURT:** His memo endorsement says that he felt --
[10] and I had it out a second ago, let me pull it out -- Judge
[11] Kara's prior ruling on this issue precludes the arguments now
[12] raised by plaintiff's counsel.

[13] So it is sort of a, what he said in another case,
[14] which Judge Francis almost seems to be saying was law of the
[15] case for all of these cases.

[16] So why is that something that should be deferred to
[17] when, in effect, he is citing my ruling in another case?

[18] It is like saying I should refer to my own ruling in a
[19] different case.

[20] **MR. DOUGHERTY:** I would say it is just as proper for
[21] any Magistrate Judge to reply on a Southern District judge in a
[22] related action or a nonconsolidated.

[23] **THE COURT:** But not necessarily to have preclusive
[24] effect, right?

[25] **MR. DOUGHERTY:** Yes.

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[1] **THE COURT:** Do you think that the MacNamara ruling has
[2] a preclusive effect in this case?

[3] **MR. DOUGHERTY:** I think that ruling was likely here
[4] considered by Magistrate Francis and was part of what is
[5] probably a conglomerate of facts that, of law, that he used to
[6] make the decision in the MacNamara case.

[7] **THE COURT:** Thank you.

[8] Mr. Meyerson.

[9] **MR. MEYERSON:** Your Honor, I do apologize for any
[10] righteousness that --

[11] **THE COURT:** -- don't apologize for righteousness.

[12] **MR. MEYERSON:** Actually, I believe it came out, I
[13] think there was a, I am saying righteous indignation on my
[14] part. My client, Ms. Hershey-Wilson is 21 years old, and I
[15] kept thinking of my 21-year-old daughter who happens to be an
[16] activist.

[17] **THE COURT:** I believe that was worth saying. I was
[18] only tweaking you.

[19] You are right, what goes around comes around.

[20] To the extent that the defendant takes what you think
[21] is a cavalier attitude toward your client's privilege, my only
[22] point is, at least Judge Francis and I agreed with you to their
[23] privilege.

[24] **MR. MEYERSON:** I understand.

[25] This is a very narrow issue, your Honor. Although I

[1] **MR. MEYERSON:** No. And I got him reversed.

[2] **THE COURT:** He is a great jurist. Go ahead.

[3] **MR. MEYERSON:** And that's not due to me. That was
[4] because I was lucky that day in front of the circuit.

[5] But the point I want to make here is, you have taken a
[6] very broad view in MacNamara of what emotional damage claims
[7] mean in reality and in law.

[8] My client, let me give you these facts, and I just,
[9] you have seen them, but my client is 24 years old. At 24 she
[10] is arrested at the RNC.

[11] When she was in high school, she and her family went
[12] to family counseling. She may have gone to independent
[13] counselling. The therapist said, you are depressed, here is
[14] some medication.

[15] She graduates from high school, has no medication or
[16] therapy for four years, gets arrested at the RNC and,
[17] basically, says, I have a natural emotional reaction when I am
[18] in jail for 24 hours. That is my emotional reaction. Has
[19] nothing to do with my mental health condition. I was scared, I
[20] was sad, I was anxious. And I got out 25 hours later. I took
[21] in the fresh air, I sighed. And it largely evaporated, all
[22] though not totally. I went to Dr. Ores before I went back to
[23] Maine. You can have my records from Dr. Orres. I am okay. I
[24] am not seeking to put into this record, in that litigation, my
[25] mental health condition. I am not going to call a

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[1] think it has profound practical and profound legal
[2] implications.

[3] The narrow issue is what triggers the waiver of a
[4] client's mental health record privilege that pre -- the records
[5] coming from a prelitigation-incident therapy.

[6] You, in MacNamara, I think that's a question of law.
[7] And I think that Magistrate Judge Francis, on both a legal and
[8] practical and differential basis, said to himself, look,
[9] whatever I think of Meyerson's arguments, and however I might
[10] have ruled, I am not going to write an opinion because whatever
[11] I think, Judge Karas has sent all of these cases to me and I am
[12] not going to buck Judge Karas because he made a ruling in a
[13] previous case which has indicated his position of law on this
[14] matter. And, therefore, I am precluded from overruling Judge
[15] Karas. He can overrule me, I can't overrule him. Fair enough.

[16] I then file this appeal and say to you, your Honor,
[17] that with due respect, I am critical, and I accept this with
[18] whatever admonition you want to give me, I am critical of your
[19] MacNamara decision.

[20] And it is like I recently said to the Second Circuit
[21] about Judge Koeltl, that I realize that the Second Circuit
[22] recognized his wisdom as a jurist, as I do your wisdom as a
[23] jurist. You are just wrong, I think, on what you did in
[24] MacNamara.

[25] **THE COURT:** No offense to Judge Koeltl.

[1] psychiatrist, I am not going to say I have a permanent
[2] condition, a clinical or nonclinical condition.

[3] **THE COURT:** Paragraph 71, quote, the plaintiff
[4] denies -- of the incident herein described --

[5] **MR. MEYERSON:** -- I accept that as my failure in
[6] developing the case. We say that's not the case. In point of
[7] fact, the facts are the facts. She never has sought treatment.

[8] **THE COURT:** The fact that she hasn't sought treatment,
[9] that wouldn't be a cause to bounce that claim.

[10] **MR. MEYERSON:** I am standing up here and saying to you
[11] that my client will get on the witness stand at the trial and
[12] say, when I say, what emotional injury did you suffer -- well,
[13] let me withdraw that.

[14] Assuming my client just got on the witness stand and
[15] said, I was in jail for 25 hours, and I didn't ask her another
[16] question about any emotional reaction injury, and then I said
[17] to a jury, she was in custody 25 hours, you should award her a
[18] sum of money for the loss of her liberty, either for 25 hours
[19] taken, anxiety and sadness she felt, objection, your Honor,
[20] there is no evidence in the record.

[21] Okay, so I want to ask her, what was your emotional
[22] reaction injury?

[23] And she will say, I was sad, I was unhappy, I was
[24] scared.

[25] And when did that end?

[1] It ended largely when I got out of jail. But I went
 [2] to somebody who said the records will show probably you will be
 [3] all right. Just go home.

[4] **THE COURT:** Let me just stop you right there.

[5] Even if she is claiming residual emotional injuries,
 [6] such that she went to, after the fact, see a therapist of some
 [7] kind, and even at the end of the day if, as a result of seeing
 [8] the therapist things get better in her life, again we are not
 [9] here at trial deciding what they get to put in. The question
 [10] is whether or not anything about her psychological history, her
 [11] mental health history -- she was 65 and had high school visits
 [12] to a therapist, is that different?

[13] That's why you have to be careful with my ruling in
 [14] MacNamara. Once that door is even cracked open a little bit,
 [15] how can it be that the defendants don't get to have access to
 [16] her psychological history to rebut either the claim for the
 [17] injuries at all or the extent of the damages she should get as
 [18] a result of the alleged injury?

[19] **MR. MEYERSON:** If --

[20] **THE COURT:** By the way, that's the majority view of
 [21] the courts in this district.

[22] **MR. MEYERSON:** Actually not the majority view of
 [23] courts throughout the country, it is the view of courts
 [24] throughout this district, which comes out of Judge Buchwald's
 [25] decision when she was a magistrate. Rather, it is a more

[1] psychiatrist to look at her, the law in this district, if they
 [2] would argue that, is, you can't do that because this is really
 [3] a garden-variety thing.

[4] And if that's the case, what is the value of the
 [5] records except to fish into the most highly sensitive material
 [6] that -- my client doesn't even know what's in there, that no
 [7] magistrate should look at. That I don't want to look at.

[8] And my position is, therefore, that if she couldn't be
 [9] subjected to an examination by a psychiatrist to disprove
 [10] something that we are not even attempting to prove, then there
 [11] is no basis for the records.

[12] And if you want to make a thing out of, did she have
 [13] psychiatric treatment five years ago in high school?

[14] She has admitted that.

[15] She has also admitted that she had medication for
 [16] depression and family counseling.

[17] I don't know what the litigation value would be of
 [18] bringing that out in front of a jury, because a jury would be
 [19] offended by that.

[20] But if the city wanted to do that, and you let --

[21] **THE COURT:** -- that's a different question. We are at
 [22] discovery.

[23] **MR. MEYERSON:** That's correct. So what is the value
 [24] of the records? We must again get to the point, Judge, of
 [25] these records are ordinarily privileged.

[1] complex claim in which the views of psychiatrists figured
 [2] prominently in prelitigation events.

[3] That is that there was a connection obviously made in
 [4] Sidor between the prelitigation therapy that that client had,
 [5] leading Magistrate Buchwald to conclude that there -- that
 [6] access to those records were relevant. There has to be some
 [7] degree of time and material relevance.

[8] And your prior ruling simply --

[9] **THE COURT:** -- forget the prior ruling. Let's talk
 [10] about this case.

[11] **MR. MEYERSON:** But the problem is, Magistrate Judge
 [12] Francis seems to have implied that whatever the merits of your
 [13] arguments, Meyerson, that I might agree with, I can't touch it
 [14] because I am reading Judge Karas's ruling --

[15] **THE COURT:** -- argue it as if the standard review was
 [16] de novo.

[17] **MR. MEYERSON:** Okay. Here is my response to you.

[18] At the same time the law in this district, as you
 [19] interpret it, seems to suggest that access to those records are
 [20] permissible because she, by merely saying I had emotional
 [21] reaction for the time of the event, triggers the waiver.

[22] The law in this district also seems to suggest, by
 [23] Judge Carter and Judge Sotomayor, when she was a District
 [24] Judge, is that when the city then says, and I will get to the
 [25] logic of it, we want to take her examination, we want a

[1] What triggers the waiver of the privilege, that is the
 [2] narrowest -- that's the very narrow issue of law. And if you
 [3] say that what triggers it is simply the fact that a client that
 [4] is put into jail for 25 hours and would testify, forget what I
 [5] put in my complaint, if you can, for the moment, would simply
 [6] testify, look, when I was in jail I was upset.

[7] **THE COURT:** And give me money for that, right?

[8] **MR. MEYERSON:** Well --

[9] **THE COURT:** -- and give me money.

[10] **MR. MEYERSON:** That is correct.

[11] **THE COURT:** And how is it that the defendants are to
 [12] prepare their defense, to rebut any claim you might make as to
 [13] why she should get any money or why she should get a certain
 [14] amount --

[15] **MR. MEYERSON:** -- Judge, it seems to me that you are
 [16] seemingly bootstrapping yourself into almost -- almost into a
 [17] nonsensical position.

[18] **THE COURT:** I am surprised to hear you say that.

[19] Because every case I have read, and I have read a bunch, in
 [20] addition to the ones you cited me to, to the extent that courts
 [21] have said that the privilege is waived even into the so-called
 [22] garden variety claims, not a term of art as far as I can tell,
 [23] but that's the one that everyone seems to be using, but the
 [24] reason it is relevant, so that the defendants can attack the
 [25] causation between the offending event and the so-called mental

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[1] distress. And also the claim for damages.

[2] I am not making this up.

[3] **MR. MEYERSON:** I understand that. And then I say to
[4] you, what do you expect to find in mental health records of a
[5] high school kid?

[6] Perhaps the high school kid might have said, gee, you
[7] know, I am depressed. And in five years if I get arrested,
[8] what will happen to me, doc? Will I be -- what conceivable
[9] relevance beyond the fact, if it is relevant at all, that she
[10] has had therapy, had medication, and that ceased to exist four
[11] years ago? If that's relevant, fine.

[12] **THE COURT:** Because when somebody claims to have
[13] suffered some sort of emotional damage, distress, anxiety,
[14] depression, their prior history, that might relate to this --
[15] we are going in circles.

[16] **MR. MEYERSON:** Can I give you another example?

[17] **THE COURT:** Let me give you another example.

[18] Let's take it out of mental health, put it in physical
[19] health.

[20] Somebody goes to a hospital and they decide to
[21] involuntarily commit the person. And in the middle of him
[22] struggling he yells out, ouch, my knee. And he doesn't put in
[23] any expert testimony that he actually ripped his meniscus,
[24] medial meniscus, or anything like that. He says, I want money
[25] for pain and suffering because my leg got hurt that day. And

[11] It is not limited to that.

[12] **MR. MEYERSON:** But --

[13] **THE COURT:** -- what you are trying to do --

[14] **MR. MEYERSON:** -- I am now limiting it.

[15] **THE COURT:** Mr. Meyerson, there is a complaint that
[16] you filed. You have brought actions against defendants. And
[17] you are seeking damages for emotional distress and anxiety.
[18] And you are trying to, at the same time, asking potentially for
[19] damages on those emotional harms. You are trying to put a wall
[20] on someone's emotional slash mental history and what they
[21] suffered on that day.

[11] **MR. MEYERSON:** I am not --

[12] **THE COURT:** -- Mr. Meyerson, interrupting is not
[13] helpful to anybody. I never put time limits on you. Don't do
[14] that.

[15] **MR. MEYERSON:** I'm sorry.

[16] **THE COURT:** But that strikes me as antithetical to
[17] common sense. And many courts around the country have said,
[18] you cannot pretend that a person's mental past has nothing to
[19] do, is completely irrelevant, and all the standards that we
[20] use -- and there is no conceivable relevance to the emotional
[21] slash mental harm that somebody suffered on that day.

[22] And you cannot ask the defendants to defend themselves
[23] on causation and on the extent of the damages without getting
[24] access to that information.

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[1] it turns out that 20 years prior to that he saw an orthopedic
[2] surgeon.

[3] **MR. MEYERSON:** For a knee injury?

[4] **THE COURT:** Yes.

[5] **MR. MEYERSON:** He is entitled probably -- they are
[6] probably entitled to get those records.

[7] Here is where we are having our debate. And it is a
[8] fascinating debate, I tried to make it in my submission.

[9] You are equating an emotional reaction to being in
[10] jail for 24 hours, which is attended to the loss of the liberty
[11] itself. It's almost intrinsic in it.

[12] I mean, I did have a client, a Quaker, an older man
[13] who, when he was asked at a deposition by the City of New York
[14] what his reaction was to being in jail for 24 hours, as the
[15] good Quaker he was, he said, actually, it was an enlightening
[16] experience. And he actually wrote to the Quaker paper.

[17] Again, it brings up a lot with my daughter, she went
[18] to a Quaker school.

[19] But he wrote to the Quaker paper. And I said to
[20] myself, you just indicated you didn't have any damages for
[21] being in there.

[22] The point being, most people, in being confined for 24
[23] hours involuntarily in a not-pleasant situation, might say, I
[24] was sad, I was upset, I was scared. And then I say --

[25] **THE COURT:** -- that's not how the complaint is worded.

[11] Now, that is not to say that there cannot be limits.

[12] That is not to say that every record gets turned over. That is
[13] not to say that there are temporal decisions here.

[14] You have a 24-year-old client, not a 74-year-old
[15] client. So her high school records -- I wouldn't say, if I was
[16] Judge Pitman, to a five-year limitation. But the reason for
[17] the limitation is that it recognizes that within that time
[18] period it is not -- say there is no reasonable relevance of the
[19] records -- go ahead.

[20] **MR. MEYERSON:** There are two things you mentioned in
[21] there. One is the complaint and one is the moreover arching
[22] philosophical debate we are having --

[23] **THE COURT:** -- I don't do philosophy, Mr. Meyerson. I
[24] am doing law.

[25] **MR. MEYERSON:** Philosophical legal debate that we are
[26] having, which is not inconsequential.

[27] The first thing about the complaint is to the extent
[28] that I drafted a complaint that defined, that says what it
[29] says.

[30] Of course, an attorney and a party can come in and
[31] say, I withdraw the lawsuit, I withdraw this claim. I narrow
[32] this to the extent of a claim.

[33] And to the extent that I have failed my client in the
[34] manner of the drafting of the complaint, in the amended
[35] complaint, to make it an -- that there is this all encompassing

[1] emotional trauma that flows from this event, I stand indicted.
 [2] But I withdraw that. And my client has narrowed the claim.
 [3] And the claim is simply that while I was incarcerated, and for
 [4] a day or two thereafter, I had the ordinary natural reaction.
 [5] Which I assume --

[6] **THE COURT:** -- she says is ordinary and natural. But
 [7] how is it that a jury is to evaluate what she says is ordinary
 [8] unless they know something potentially about her emotional
 [9] past?

[10] You know, New York law recognizes the thin skull
 [11] doctrine for psychological harms not recognized by the Second
 [12] Circuit. But there are plenty of cases within New York State
 [13] that recognize it.

[14] It is interesting because that could easily inure to
 [15] the plaintiff in these kinds of cases.

[16] I don't want to get into philosophy.

[17] **MR. MEYERSON:** This is a legal argument, your Honor.
 [18] What I import from your comment, that I listened to
 [19] very carefully, and I apologize for interrupting, although I
 [20] did hear what you are saying, is, how do you know what is, and
 [21] I understand what you are saying, inquiring, how do I know that
 [22] that's natural?

[23] The natural flow of that inquiry leads to them getting
 [24] records, because, you will say, get these records; and them
 [25] saying, oh, but irrespective of the records, she shouldn't have

[1] **THE COURT:** Because she is only six years removed from
 [2] high school. If she were 74 years old and it was high school
 [3] records, you might have a point. Which is why many courts have
 [4] accepted, in part, your argument.

[5] But they tailor it to the facts before them. And
 [6] that's what I am trying to do, and say, that whether or not
 [7] MacNamara was the right decision or not, I am focused on this
 [8] case.

[9] **MR. MEYERSON:** Okay. Well, I would ask you, then, to
 [10] defer back to Magistrate Judge Francis, and let me make the
 [11] arguments to Magistrate Judge Francis on the assumption, as I
 [12] read his decision, that he did not even waive the arguments,
 [13] simply said, I am precluded.

[14] And it is understandable why he did that.

[15] My last point and I will sit down, and it is, by
 [16] comparison, not a knee injury, but more directly in point.

[17] In an antiwar demonstration case that I have with the
 [18] city, a client was in custody seven or eight hours. She was an
 [19] NYU student. A freshman then.

[20] She'd had counseling when she went to NYU. She said
 [21] that during the seven or eight hours she was on and off crying,
 [22] the next day she was upset. And that's the extent of her
 [23] emotional injury associated with what she believed was a false
 [24] arrest and loss of her liberty.

[25] The city didn't ask for the mental health records in

[1] had this reaction. Or maybe because of the fact that she
 [2] concedes she had depression, that's why she had the reaction.
 [3] Your Honor, we need to have her go to our psychiatrist for
 [4] several hours.

[5] And Mr. Meyerson now needs to put on a psychiatrist so
 [6] that the jury can be -- so it can be explained to a jury that
 [7] intrinsic in being restrained of your liberty for 24 hours in a
 [8] jail, is a natural reaction of, whatever it might be, might
 [9] even be giddiness, but in this case it was sadness.

[10] I just think, your Honor -- by the way, I believe the
 [11] law in this district is that they wouldn't be able to get that
 [12] mental health --

[13] **THE COURT:** -- why are we having a discussion about
 [14] something that is not on the table right now? Because the
 [15] cases do recognize the distinction between a defendant's
 [16] interest in getting past mental health history of a plaintiff,
 [17] either an employment discrimination case, a civil rights case,
 [18] and a rule --

[19] **MR. MEYERSON:** -- at least --

[20] **THE COURT:** -- according to the cases that I read,
 [21] let's --

[22] **MR. MEYERSON:** -- but I think they are inner related,
 [23] because if, in fact, you can't get the examination, what does
 [24] the value of a record that says she was depressed in high
 [25] school have to do with her saying, I was afraid --

[1] that case. That's neither here nor there, that's that
 [2] litigation. But the import of your decision is, that if my
 [3] client had come in and said, look, I had no emotional damages
 [4] other than the fact that when I was in custody I cried on and
 [5] off, the next day I related to my family what happened, and I
 [6] was upset. And that was it. That they then -- that triggers a
 [7] waiver to open everything and anything.

[8] And if you are fortunate to be a young kid, an
 [9] 18-year-old freshman at NYU, or a 24-year old -- if you are
 [10] unfortunate enough, maybe, to be 24 and had gone to a shrink
 [11] when your family sent you to a shrink, when you were in high
 [12] school, the unfortunate situation, under Judge Karas's ruling,
 [13] is that if you were 74 you wouldn't have to give up those
 [14] records, but at 24 you do. It doesn't make any sense. And
 [15] maybe the law --

[16] **THE COURT:** What you are saying is it is never
 [17] relevant. What I am saying, it depends on the case.

[18] Do you think the blanket rule is never relevant and
 [19] they take the --

[20] **MR. MEYERSON:** -- there are Courts that have taken
 [21] that position. Your Honor, please, with due respect, I respect
 [22] your broad ruling, it is a very broad ruling, but --

[23] **THE COURT:** I haven't ruled yet.

[24] **MR. MEYERSON:** Well, in MacNamara, there it's a broad
 [25] ruling.

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[1] **THE COURT:** It is not a broad ruling. It's actually
 [2] not a broad ruling. But doesn't matter, we are not here to
 [3] reopen MacNamara.

[4] **MR. MEYERSON:** There are cases that reject your
 [5] position, that say --

[6] **THE COURT:** -- it wouldn't be the first time. Or the
 [7] last.

[8] **MR. MEYERSON:** That say that the emotional reaction
 [9] condition that I am describing here doesn't put in to play her
 [10] mental health condition, which is a different thing, as a
 [11] matter of law, that is what I am arguing.

[12] **THE COURT:** Okay. Thank you, Mr. Meyerson.

[13] **MR. DOUGHERTY:** Well, your Honor, what, at first what
 [14] I think we need to do is pull back and realize that we are in a
 [15] court of law. And subsequently we are governed by rules of
 [16] procedure.

[17] And here the rule that we are governed by is the
 [18] standard under Rule 72.

[19] And under that standard, and under the case law
 [20] governing that standard, Mr. Meyerson has failed to show that
 [21] Judge Francis's ruling was either clearly erroneous or contrary
 [22] to law.

[23] And just briefly on the clearly erroneous point.

[24] Under Lindenal versus Citco Refining, the reviewing Court has
 [25] to be left with the definite and confirm conviction that a

[1] psychological history that reached back five years, which is
 [2] the same time frame that we are working with here.

[3] **MR. MIRRO:** Judge, if I may, just to add one or two
 [4] brief points.

[5] **THE COURT:** Yes.

[6] **MR. MIRRO:** First, I want to thank you, Judge, for
 [7] your patience today.

[8] A couple of points I wanted to mention, Judge. First,
 [9] you asked earlier about the standard of review and Judge
 [10] Francis's order.

[11] I would like to emphasize, Judge, Judge Francis had
 [12] before him all of the factual materials and all of the factual
 [13] arguments that we are making today.

[14] In addition, Judge Francis had before him the legal
 [15] authorities that we submitted to your Honor. So Judge
 [16] Francis's decision and Judge Francis's order, were based on
 [17] both the facts and on the law.

[18] And in that situation, I would submit to you, Judge,
 [19] that the standard here is, as Mr. Dougherty has said, is the
 [20] clearly reasonable standard.

[21] This is not a case where the Judge Francis has made up
 [22] purely a determination based on purely legal principles that
 [23] might be a de novo, might be subject to de novo review by this
 [24] Court. This decision was based on both facts and the law. And
 [25] citation.

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[1] mistake has been committed.

[2] Additionally, Mr. Meyerson has failed to establish
 [3] that Judge Francis failed to apply relevant case law or
 [4] statutes, that that is the standard of review that this Court
 [5] should be governed by making its determination on this motion.

[6] And just to get into the merits, the reason that

[7] Ms. Hershey-Wilson's psychological history is relevant and
 [8] discoverable, is because she put it at issue by claiming and
 [9] seeking emotional distress damages.

[10] We are governed by the complaint which suggests that
 [11] there are residual effects that she suffered as a result of her
 [12] arrest, which was a sworn statement as well as interrogatory
 [13] responses, indicate that in interrogatory 5 she suffered
 [14] emotional distress, mental anguish, fear, psychological trauma.

[15] Because of that, it is clear -- and she is seeking
 [16] damages, money damages, which would ultimately come from the
 [17] taxpayers of New York for those damages which the city must be
 [18] allowed an opportunity to examine intervening causation of her
 [19] emotional distress, and obtain a picture of her psychological
 [20] history.

[21] And one of the things that is also relevant, I would
 [22] like to point out, is that the records we are seeking are
 [23] contemporaneously relevant to her arrest. She was 24 at the
 [24] time. The records reach back maybe four or five years. And
 [25] under Judge Pitman's ruling in McKenna, he allowed in

[1] Maybe there is language in that order that suggests,
 [2] loose language in the order, that suggests otherwise. But
 [3] that's what was in front of him. And we would submit that
 [4] Judge Francis couldn't have made a determination that your
 [5] Honor's decision in MacNamara was pervasive unless he
 [6] considered the factual underpinnings.

[7] The only other point, Judge, that I wanted to make at
 [8] this point, the question of relevance has come up.

[9] Your Honor clearly understands what the issue is here.
 [10] And the issue is, and as Mr. Dougherty said, the issue is one
 [11] of causation.

[12] Mr. Meyerson's client is suing us for money due to
 [13] emotional, claimed emotional distress, that results in waiver.
 [14] And the reason that the emotional history, the psychological
 [15] history are relevant, because we are entitled, as the Court has
 [16] alluded to several times today, to examine this plaintiff on
 [17] what alternative causes of emotional distress she may have been
 [18] suffering at the time of her arrest and after her arrest.

[19] Your Honor, the principle here is that defendants are
 [20] not obligated to take plaintiff's word for it, that her
 [21] emotional distress was caused solely by the arrest and
 [22] confinement.

[23] We understand that counsel -- plaintiff's counsel made
 [24] a very fine argument, and we understand that he is advocating
 [25] on behalf of his client. But we are not obligated, and it is

[1] contrary to the discovery rules to suggest that we are
 [2] obligated, to take plaintiff's word for it on the causation
 [3] question with respect to her emotional distress. And it goes
 [4] to damages as well.

[5] I think that is the sum and substance of it, Judge.
 [6] And, obviously, there is just a wealth of authority supporting
 [7] both the MacNamara decision and the ruling that we are seeking
 [8] here.

[9] I mean, and let's look at it, just one other point,
 [10] one other point. Mr. Meyerson has not put in, really, any
 [11] legal authority of substance. He got a wealth of authority
 [12] from outside the district that obviously doesn't bind the
 [13] Court. But he hasn't explained why this case is any different
 [14] from all the decisions that do bind this Court, including
 [15] Second Circuit opinions.

[16] And I think I will leave it at that.

[17] **THE COURT:** Sure. Mr. Meyerson, you get the last
 [18] word.

[19] **MR. MEYERSON:** One, Mr. Dougherty talked about
 [20] intervening causation. This is a preexisting causation, and I
 [21] would agree with him, that if we were dealing with an
 [22] intervening causation, that is that there had been the arrest,
 [23] she said this, and then afterwards some other incident
 [24] occurred, then it becomes -- and she sought treatment for that,
 [25] we then have that intervening causation.

[1] **THE COURT:** I don't know that Rule 72 applies here,
 [2] but I know, for it doesn't make sense to send it back to Judge
 [3] Francis because then the losers are going to come back to me
 [4] anyway. So whether or not it is de novo review or discretion,
 [5] I would assume it is de novo review. Not that I think Judge
 [6] Francis did anything wrong.

[7] Rule 26 provision for liberal discovery, anything that
 [8] is relevant to, conservatively relevant to the case that can
 [9] lead to admissible evidence, the parties are entitled to Rule
 [10] 26. And the law recognizes privileges.

[11] But the law also disfavors privilege because they
 [12] detract the ascertainment of the truth. And, therefore, the
 [13] law recognizes that in certain situations, when a plaintiff
 [14] makes certain claims related to medical damages or mental
 [15] health damages, then the plaintiff can be deemed to have waived
 [16] the applicable privileges.

[17] Now, let me say, just so it is crystal clear for the
 [18] record, I don't feel bound by what I ruled in MacNamara,
 [19] because these are evidentiary rulings. These are discovery
 [20] rulings. These are not matters of first impression where the
 [21] principle is unaffected by the facts of the particular case.

[22] So it is true that the city put forth legal arguments
 [23] in addition to my ruling in MacNamara. And whether Judge
 [24] Francis felt he was bound by that ruling or he was persuaded by
 [25] it, is of no import to this case. MacNamara is MacNamara, this

[1] Number 2, with all due respect to the city, in
 [2] substance, they are ruled -- that Judge Francis was ruled by
 [3] MacNamara, whether or not you were limiting it to -- he was
 [4] precluding it to where he could go or not go on this matter.

[5] Finally, to the extent that the city wants to put into
 [6] play the fact that she had a preexisting condition for which
 [7] she sought treatment, they have the facts. I did not direct
 [8] her not to answer, or -- she hasn't been deposed yet, but they
 [9] know that she has, and she would answer, she had -- I guess it
 [10] came out of her 58-H hearing. She did say, I had treatment, it
 [11] was for depression, in family counseling.

[12] To the extent that they want to bring to the jury that
 [13] there were other matters that implicated her actions, and the
 [14] information in the records isn't going to elucidate anything.

[15] Thank you, your Honor. I apologize and I appreciate
 [16] your indulgence.

[17] **MR. DOUGHERTY:** On the issue of causation, actually,
 [18] one of the cases cited by Mr. Meyerson, *Bridge v. Eastman*
 [19] Kodak

[20] there was language in that case, on page 223, saying
 [21] that, moreover, since plaintiff seeks to prove they suffered
 [22] emotional distress, defense counsel has the right to inquire
 [23] into plaintiff's past for showing, at least in part, that they
 [24] were not job related.

[25] That case dealt with Title VII sexual harassment.
 But it should be considered in this case as well.

[1] case is this case.

[2] Now, in terms of this case, we have a 24-year-old
 [3] plaintiff who has claimed, both in her complaint and in her
 [4] interrogatory responses, which presumably she can't blame Mr.
 [5] Meyerson for, that she suffered emotional distress,
 [6] psychological trauma, fear, humiliation, embarrassment and
 [7] anxiety.

[8] She went to see a doctor. And in the complaint she
 [9] alleges that she continues to suffer residual emotional
 [10] damages.

[11] Now, Mr. Meyerson may want to selectively withdraw
 [12] that one sentence from the complaint. But her interrogatory
 [13] answers are it. That is it. That is what she is claiming.

[14] And she would then ask a jury to award her damages,
 [15] presumably not an insignificant amount of damages, based on
 [16] those injuries.

[17] Now, some might call those garden variety. Some have
 [18] described precisely those kind of damages being more than
 [19] garden variety.

[20] I haven't read a case that gives the precise
 [21] definition of what garden variety is.

[22] It has been my experience that garden variety is part
 [23] in the eye of the beholder, but even assuming it is a garden
 [24] variety claim, I am persuaded by the cases, not just in this
 [25] district, but around the country, that have found that

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[1] precisely such claims waive the privilege to some extent.
 [2] Because I do think, to the extent that somebody is claiming,
 [3] for example, psychological trauma, even if she doesn't intend
 [4] to substantiate the claim, or to quantify her damages through
 [5] the use of an expert, just based on her own testimony of what
 [6] she felt, what she felt she was harmed by, what emotional pain
 [7] and suffering she claims to have been inflicted upon her, opens
 [8] the door to the possibility that the defendant should be
 [9] allowed to explore either alternate causes for such
 [10] psychological trauma and other mental health damages, and also
 [11] to rebut the claim for the amount of damages that the plaintiff
 [12] might seek from a jury.

[13] And the cases that discuss this, discuss it in a wide
 [14] variety of contexts, employment discrimination, and civil
 [15] rights, and specifically describe them as garden variety cases,
 [16] and specifically note that the plaintiff is not claiming to
 [17] rely on an expert to substantiate the claim for mental health
 [18] damages.

[19] But the fact that plaintiff isn't saying,
 [20] notwithstanding what is in her complaint, that she continues to
 [21] suffer from these things, that may just go to the amount of
 [22] damages she gets, it doesn't change the fact that she is
 [23] alleging that the wrong done to her allegedly by the
 [24] defendants, caused her mental health harms.

[25] And it cannot be redressed as emotional distress, and

[1] is waived in its entirety. It depends on the case. It depends
 [2] on the claim, it depends on the extent of the mental health
 [3] history that, in part, may depend on, for example, the length
 [4] of time between when somebody may have sought psychiatric
 [5] health or suffered from some sought of emotional disease. Even
 [6] and when the alleged injury took place.

[7] Here, even a five-year limitation, so the defendant
 [8] would not be allowed to go back further than five years into
 [9] plaintiff's mental health history, wouldn't change anything
 [10] because, as I understand it, a lot of the data is within the
 [11] five years. But I am not saying that five-year rule makes
 [12] sense here. I am saying that a 24-year old isn't getting any
 [13] comfort.

[14] I think what happened to her in high school and
 [15] college is relevant to what she is claiming in this case.

[16] And, Mr. Meyerson, I don't take lightly at all your
 [17] philosophical point. I understand this may put people like
 [18] your client in a potential dilemma, but that is what the law
 [19] does to your client's position. It is not just your client, it
 [20] is people alleging all kinds of mental health allegations. It
 [21] involves things in people's medical history that they don't
 [22] want revealed. But the law says they have to make a choice.
 [23] If they want to recover money for these types of injuries, then
 [24] they have to be prepared under these circumstances to
 [25] recognize, to properly allow the defendants to rebut the claim,

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[1] somehow pretend it is in another category where there is no
 [2] relevance between somebody's mental health history and the
 [3] emotional distress that somebody claims to have suffered.

[4] And that is what the cases talk about. I am not going
 [5] to list them all. Some of the ones are the ones listed in the
 [6] city's papers. But I have read cases, there is a recent case
 [7] from the Eastern District of Michigan that goes through the law
 [8] on this.

[9] For the record, of course, I reviewed the McKenna
 [10] case. I reviewed the Sidor case, which Judge Buchwald does
 [11] say, even if it is garden variety, that it does open the door.

[12] There is a case called Williams versus NPC
 [13] International from the Northern District of Mississippi. There
 [14] is a case called Victoria versus Larkinder from the Eastern
 [15] District of Louisiana, Synbios. S-Y-N-B-I-O-S. Another
 [16] Colorado case called Fox versus The Gates Corporation.
 [17] District of Connecticut case called Gattegno, G-A-T-T-E-G-N-O,
 [18] versus Price Waterhouse Coopers LLP.

[19] And, by the way, so everybody's clear, none of this
 [20] means that if the defendant wants to do a Rule 35 examination,
 [21] that this ruling is a per se basis for them to get that. We
 [22] will have that fight if and when the defendant makes that
 [23] application.

[24] Now, I do think that, as Judge Pitman recognized, and
 [25] I think he is right, that this doesn't mean that the privilege

[1] either in terms of causation or in damages, that they are going
 [2] to get peeked into that person's mental history, as in this
 [3] case.

[4] So I am affirming Judge Francis's ruling, even on the
 [5] de novo standard.

[6] **MR. MEYERSON:** Could I have the records before they
 [7] are sent to the city reviewed by Magistrate Judge Francis?

[8] **THE COURT:** Yes, thank you for reminding me of that.
 [9] It is something I did in MacNamara.

[10] If it is something, even in the context of
 [11] psychological records that would appear to be super sensitive,
 [12] for example, if there is something that comes up in an
 [13] evaluation by a doctor, that came up in a conversation with a
 [14] doctor, but really isn't relevant to the damages claimed here,
 [15] I don't want to give an example because I wouldn't want to
 [16] impugn your client, I wouldn't see a problem if you want to
 [17] have Judge Francis review them in camera first.

[18] I do think you should be judicious in using that tool.

[19] **MR. MEYERSON:** Do I understand -- my understanding is
 [20] that my client went to high school and lived in Portland. So I
 [21] don't even -- I get to her name of her family counselor,
 [22] psychiatrist, co-therapist, whoever it was. I will get an
 [23] authorization from my client and I will send for the records
 [24] and ask them to be delivered to Magistrate Judge Francis, I
 [25] guess.

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[1] **THE COURT:** But that is precisely what I was
 [2] suggesting I don't think you should do. Because what you are
 [3] saying is that -- all of these records are so sensitive they
 [4] should be reviewed in camera.

[5] **MR. MEYERSON:** I don't know. I don't even think --

[6] **THE COURT:** -- I know that you can take an appeal if
 [7] you want.

[8] **MR. MEYERSON:** Well, then, I will get the records
 [9] under your order, I will review them understanding your order
 [10] is that I shouldn't just be knee jerk about it and make a
 [11] judgment as to whether I think there is something in there that
 [12] is of super sensitivity. For example, the topic of an
 [13] incestuous thing, I am not suggesting that that is in there.

[14] **THE COURT:** What if, in the course of talking to a
 [15] psychiatrist, somebody admits to committing a crime, a
 [16] misdemeanor, that may have no relevance to this case
 [17] whatsoever, could be highly prejudicial. It is a case that has
 [18] been through a deferred prosecution or some sort of alternative
 [19] resolution and wiped from the records. That might not go to
 [20] her credibility. But I can see an argument being made. And
 [21] what my ruling allows for is for you to exercise your judgment
 [22] and seek refuse from Judge Francis.

[23] **MR. MEYERSON:** Secondly, and this is again an inquiry,
 [24] assuming that my client decides that she doesn't want to pursue
 [25] whatsoever emotional damage claims, and that the only claim she

[1] is an issue that, of course, came up in the MacNamara case.
 [2] And we have that transcript. And there you described the type
 [3] of records of being extraordinarily sensitive. I think the
 [4] parties would benefit, Judge, from some clarification on what
 [5] you mean.

[6] Here is my concern, Judge. We have a motion pending
 [7] right now before Judge Francis, where one of the plaintiff's
 [8] counsel is asking for Judge Francis to do a line-by-line review
 [9] of psychological records, and to adopt certain redactions and
 [10] so on. So the issue is going to be, the issue is very ripe
 [11] before Judge Francis, I think it would be helpful if you could
 [12] give some guidelines as to what you think --

[13] **THE COURT:** I think I just did by way of example. I
 [14] can't do any better than what I have done.

[15] Again, you have to, from my standpoint, these have to
 [16] be culled down the middle. The ruling that Mr. Meyerson got in
 [17] his favor as to your client's work history, and the privileges
 [18] and whatnot, if you had wanted to go to Judge Francis with
 [19] something super or extremely sensitive, then you can make that
 [20] application.

[21] But it is more a, you-will-know-it-when-you-see-it
 [22] kind of thing. I can't give more direction. And, frankly, I
 [23] would be more reluctant to because my involvement in discovery
 [24] in this case is very different than Judge Francis's. He is in
 [25] the weeds.

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[1] will make is for the loss of her liberty and the violation of
 [2] her rights, the damage claim, and I withdraw that claim
 [3] formally and in every which way. I take it then the records
 [4] become irrelevant?

[5] **THE COURT:** You are asking for an advisory opinion?

[6] **MR. MEYERSON:** No, I am asking, because there are
 [7] three options, and the third option is to withdraw the lawsuit.

[8] I don't know what my client's answer is going to be.
 [9] I never asked my client. But I wanted to make the arguments
 [10] without me being affected that my client may elect to withdraw
 [11] the case, because I think that it is punitive. I understand
 [12] your ruling and you are not punitive.

[13] **THE COURT:** I -- you can do the research. If all she
 [14] is going to claim is mere loss of liberty, you know, I haven't
 [15] seen any cases that say one thing or another on it. But you
 [16] can decide what you want to do. I hope she doesn't withdraw
 [17] the whole case.

[18] **MR. MEYERSON:** I understand that. You are not going
 [19] to rule on that. But on the issue --

[20] **THE COURT:** I couldn't possibly. I haven't thought
 [21] about it, it's an advisory opinion, I understand why you asked
 [22] for it. But I can't answer the question, Mr. Meyerson.

[23] **MR. MEYERSON:** Okay.

[24] **MR. MIRRO:** You raised an issue about in-camera review
 [25] by Judge Francis of certain super sensitive records. And that

[1] So for me to tell him, an excellent jurist, to use Mr.
 [2] Meyerson's laudatory phrasing, somebody who is steeped in the
 [3] facts of these cases, to tell him how to evaluate these things,
 [4] would be folly.

[5] Look, I am going to assume, with good reason, the good
 [6] faith of Mr. Meyerson. And, of course, going to assume that
 [7] Judge Francis will give this an expedited and serious and
 [8] thorough review. And to the extent people have a disagreement
 [9] with how he's handled it, I am here six days a week

[10] **MR. MIRRO:** One other question. We have had
 [11] opportunity to review the MacNamara transcript where you talk
 [12] about the in-camera procedure. One of the things you said, I
 [13] just want to know if you are still on board with this, that the
 [14] in-camera procedure should only be employed where something is
 [15] super or extraordinarily sensitive, and where, you said,
 [16] irrelevant to the case.

[17] **THE COURT:** But that is the balancing. From Mr.
 [18] Meyerson's standpoint, the example I gave about, in the course
 [19] of meeting with a therapist, something got said that has
 [20] nothing to do with the therapy, just comes up with the
 [21] conversation. I am taking an extreme example. It arguably
 [22] will not be -- it is not discoverable, or even if it is
 [23] remotely relevant, and maybe there is some other reason to
 [24] preclude it being turned over, what if, in the context of
 [25] talking about her psychological past, she brings up a medical

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[1] issue that has got nothing to do with this case, deeply
 [2] personal medical issue, that has got nothing to do with this
 [3] case, then Judge Francis could decide that the records will get
 [4] turned over in redacted form. I can't give any more direction
 [5] than that.

[6] **MR. MIRRO:** My only concern is that if a patient is
 [7] going to a psychotherapist or counselor or psychologist to deal
 [8] with her emotional distress, presumably serious emotional
 [9] distress, arising from something, whatever that something is,
 [10] then my question becomes, gee, is that still an issue in this
 [11] plaintiff's life, was it an issue at the time of her arrest.

[12] **THE COURT:** When you get something that is redacted
 [13] and you want to challenge it, you call me up and I will see
 [14] you.

[15] **MR. MEYERSON:** I take it that any records that are
 [16] eventually turned over to the city will be turned over under
 [17] protection?

[18] **THE COURT:** Yes. Thank you, Mr. Meyerson.

[19] **MR. MEYERSON:** And finally, I am not sure what I am
 [20] going to do, and with all due respect to you, because I raised
 [21] it in my submission, I am asking you to certify the issue, it
 [22] is a very -- I am professionally and personally concerned about
 [23] this issue. After 36 years, there are not too many issues that
 [24] pound me, because you have seen it all. But this is kind of an
 [25] issue that I think is a very, very important issue.

[1] clarification.

[2] **THE COURT:** He is going to turn over his client's
 [3] mental history records. But he is going to look at them in
 [4] their entirety and decide whether or not there are some things,
 [5] some documents, some records within that bundle that he would
 [6] like Judge Francis to say he doesn't have to turn over. And
 [7] the rest of it he will turn over. He will turn it over if
 [8] Judge Francis disagrees with him. So everything gets turned
 [9] over unless Judge Francis says it doesn't.

[10] **MR. DOUGHERTY:** Thank you, your Honor.

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[1] **THE COURT:** You don't even have the records handy
 [2] right now, so you are going -- it is going to take you some
 [3] time to get the records, go over them with your client, and you
 [4] can decide what you want to do. And you can let me know.

[5] **MR. MEYERSON:** Thank you, your Honor.

[6] **THE COURT:** I don't think there is any prejudice to
 [7] defendants if, since Mr. Meyerson isn't sitting on the records
 [8] anyway, I would, even if he were, I would give him some time to
 [9] think it over.

[10] I have been told many times by the city that you are
 [11] overworked anyway, so you can work on other motions that are
 [12] coming your way.

[13] **MR. DOUGHERTY:** Your Honor, just one, finally. I just
 [14] want to be clear that Mr. Meyerson turns over the records to
 [15] Judge Francis, and he is not involved in any self-review or
 [16] redaction prior to these being closed to the case. Plaintiff
 [17] should not be involved in selective determination of relevance
 [18] of their psychological records.

[19] **THE COURT:** I think what Mr. Meyerson and I talked
 [20] about is that he will turn them over, except to the extent
 [21] there is something he would like Judge Francis to review and
 [22] perhaps redact. So what you are talking about is Mr. Meyerson
 [23] shows the documents to nobody, you or Judge Francis, that is
 [24] not at all what we talked about.

[25] **MR. DOUGHERTY:** I guess I just wanted some

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